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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**
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10 DAVID W. BATHKE,

11 Plaintiff,

12 vs.

13 CITY OF OCEAN SHORES, CRYSTAL
14 DINGLER,

15 Defendants.

Case No. 3:19-cv-05338-BHS

BATHKE TRIAL BRIEF

16 **A. The Exempt Employee Agreement**

17 This is a breach of contract action. Plaintiff, Chief David Bathke (“Chief Bathke”) entered
18 into an Exempt Employee Agreement (Ex.106)¹ containing the following protections from
19 termination:

20 “Employees’ employment shall not be terminated by the City except for “*cause*”, *with the grounds*
21 *therefor to be the same as those applicable to the City’s union-represented employees*, including
22 provisions relating to any reduction-in-force.” (*emphasis added*)

23 This language not only prevents Chief Bathke from being terminated “except for cause,” but
24 also states that the standard provided to any termination of Chief Bathke was to be the same standard
25 applied to the “City’s union-represented employees.”

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27 ¹ All exhibits refer to those contained on the Trial Exhibit List.
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1 That this is the standard to be applied was admitted to by the City. In an email dated January
2 10, 2019 from the City's attorney to the person brought in to investigate this matter, the City
3 attorney's instruction were the following:

4 "This is not an employment contract with department heads, but rather an agreement
5 that was reached back in 2009 between the city and the "exempt employees" (i.e.,
6 department heads, including the police chiefs). It includes a provision that exempt
7 employees will have the same "just cause" standard for termination as unionized
8 employees." (Ex.115).

9 Indeed, the Exempt Employee Agreement refers to the exempt employees as an "Exempt
10 Employees bargaining unit." The reason for this is that department heads are, by definition, exempt
11 from the civil service rules (hence the term Exempt Employees). In order to be afforded the same
12 protections as the union members who are protected by the civil service rules, the Exempt Employees
13 formed a bargaining unit and negotiated these same protections as part of their agreement.

14 Chief Bathke will testify that when he was hired it was important to him that he be provided
15 these protections from being terminated. This is because he was being brought into a department
16 that had a history of a revolving door regarding fire chiefs where the past several chiefs had lasted
17 two years or less, a department that had been without a fire chief for a number of months, and a
18 department which was fraught with problems.

19 Chief Bathke was brought in to fix these problems and he knew that the changes he would
20 have to make would not be popular. It was therefore important that the City, and specifically Mayor
21 Dingler, support his efforts. What he found out is that after he did exactly what he was tasked to do,
22 the Mayor instead of supporting him, threw him under the bus. It was precisely because Chief Bathke
23 was concerned that the political climate would cause the Mayor to turn against him that he insisted
24 that he be afforded the safeguards against termination. When he was hired, the Mayor assured him
25 that the Exempt Employee Agreement provided these needed safeguards.

1 **The Hiring of Chief Bathke**

2 When the City was in the process of recruiting a new fire chief it had been without a fire chief
3 for almost six months and faced a number of challenges, both economic and non-economic, including
4 the following:

- 5 1. The fire department was running over budget by an annual amount of almost \$200,000 in
6 unbudgeted overtime wages paid to the firefighters. For a small city such as Ocean Shores,
7 this is a significant amount.
- 8 2. Seven of its firefighters had been hired pursuant to what is known as a Safer Grant. This grant
9 was due to expire, and the City would lose about one-third of its full-time firefighting/EMS
10 force. This posed a huge safety issue for the City.
- 11 3. The City's fire engines were old and antiquated. Two of the fire engines had passed their
12 service life per the National Fire Protection Agency ("NFPA") standard, in fact, they qualified
13 for "collector plates." A new, modern day engine was needed.
- 14 4. The fire department was on an antiquated paper scheduling and timecard system. The
15 firefighters had objected to convert to an electronic records management system which
16 needed to be done to comply with state and federal mandates and data collection.
- 17 5. The firefighters had been working for six months without a contract because the City had not
18 agreed with the terms demanded by the Union. The City needed a chief that could be tough
19 and get an agreeable contract completed. (Ex. 107)
- 20 6. The fire department is a quasi-military organization, yet the firefighters had arranged
21 themselves in three different shifts which were working independent of each other. This lack
22 of uniform leadership compromised the proper chain of command and resulted in unnecessary
23 overtime, safety issues, and failure to follow call response policies.
- 24 7. The fire department members needed proper modern training programs, as their lack of
25 training presented a safety issue.

26 During her interview with Chief Bathke, Mayor Dingler explained to him these, and other
27 issues, in detail. She told him that it would be a challenge but that she needed a strong, no-nonsense
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1 chief who would not be afraid to command the firefighters. Indeed, the union firefighters have been
2 without consistent leadership for several years and were used to running the department themselves.
3 The police chief had oversight of the fire department for a period of time. After that, the new fire
4 chief hired by the City, Tom Lique, lasted for two years before he was asked to resign in December
5 of 2016.

6 Mayor Dingler asked Chief Bathke if he was a personality that could take on this out of
7 control department, and he said he could. She informed him the firefighters have been without a
8 contract for several months. He warned her that any change would cause discontent with the
9 firefighters especially in that he would be reducing their compensation by cutting out unneeded
10 overtime and holding them accountable in following city policies. The Mayor told him that she
11 understood this, and she would fully support him.

12 Unbeknownst to Chief Bathke, as part of her background check on him, the Mayor had
13 secretly received a 2-page letter from the Maple Valley fire department's union leader written in
14 November of 2016 which she describes in her declaration as being "very unflattering" to Chief
15 Bathke. (Ex. 151). This letter specifically informed the mayor that Chief Bathke went so far as to
16 "burn bridges" because of his "aggressive handling of union issues with management" and that he
17 "stretch[ed] out his firefighters to bring in more revenue." (Ex.102). It also included disparaging
18 language calling Chief Bathke "conniving," "insincere," "manipulative," "deceitful," "selfish," a
19 "snake," not "honest." When the mayor received this secret Maple Valley union letter, she responded
20 in an email saying, "not what we wanted to hear, but I suspect what we needed to hear." In other
21 words, the mayor knew exactly the type of personality she was hiring as it was necessary for her to
22 bring in outside leadership to resolve the issues at hand.

23 Mayor Dingler and Ocean Shores' fire department's Union leader, Corey Kuhl, exchanged
24 this Maple Valley letter on their personal email (as opposed to their official City email). (Ex.102).
25 For some reason, this Maple Valley letter was kept confidential and hidden from Chief Bathke as
26 well as any of the other firefighters until the actual "no confidence" vote was taken eighteen months
27 later at a union meeting on December 10, 2018. During this meeting, Corey Kuhl projected the letter
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on the wall to obtain support for the no confidence vote. Why it was kept from the firefighters and not discussed during the interview process is unknown.

Commencement of Work

In April of 2017, the Mayor offered Chief Bathke the full-time fire chief's position starting in June, in addition to a job immediately as a consultant prior to taking the office of fire chief. Chief Bathke immediately worked as a consultant for the Mayor on issues she had with the Union. He began his tenure as fire chief in June of 2017. The Mayor's office is in the fire department building. His office was immediately adjacent to her office and they shared a common door. Chief Bathke will testify that he conferred with the Mayor on a daily basis. At the Mayor's request, Chief Bathke kept the Mayor apprised of the fire department's operational activities since the outset. That is, the Mayor was intimately involved and directed the majority of all of the decisions made by Chief Bathke during his tenure.

The Chief immediately went to work to make the needed changes as directed by the Mayor, and accomplished the following:

1. He reduced the overtime problem, and during his 1 ½ years as Chief, the department operated within budget. After he was terminated, it is apparently over budget again.
2. He was instrumental in obtaining an extension of the Safer Grant and assisted the City in its efforts to raise the ambulance utility rate, while taking it off the City's general fund, which allowed the City to save the jobs of the seven firefighters.
3. He was instrumental in obtaining a new, state of the art, fire engine through the acquisition of an AFG grant by assisting the City's fire department grant writers as he is well-trained in grant writing and has been a grant peer evaluator for FEMA grants. Indeed, the Mayor has listed the new engine as part of her accomplishments while acting as Mayor.
4. He converted the fire department to a new, electronic records management system, and by doing so it allowed the City to comply with state and federal mandates and data collection. Additionally, these electronic records programs provided electronic scheduling and payroll accountability, electronic patient reporting and billing, call statistics analysis, which

1 increased revenue for the fire department.

2 5. He assisted the Mayor with negotiating a new collective bargaining agreement with the Union
3 firefighters. The City and the Union could not come to an agreement until eighteen months
4 after its expiration due to the Union's unreasonable demands.

5 6. He rearranged the firefighters and changed the three different shifts to facilitate safety training
6 and mentoring of the junior firefighters by the senior firefighters. By doing this, he was able
7 to reduce unnecessary overtime and created uniformity within the department.

8 7. He brought in multiple training classes to the City to allow the firefighters to become properly
9 trained in NFPA safety measures and to learn the most current practices.

10 After six months, the probationary period ended and Chief Bathke was made a tenured fire chief
11 and received a raise in pay. At that time, on November 12, 2017, the Mayor wrote Chief Bathke
12 congratulating him and stating "I am impressed with your leadership skills and style and look forward
13 to a long career for you here in Ocean Shores. Thank you for joining our team." (Ex.110).

14 During this time, Chief Bathke held monthly formal "Officers Meetings." Minutes were kept
15 of each of these meetings. (Ex.173). The purpose of the meetings was to discuss the changes and the
16 best way to handle them. Because a fire department is a quasi-military organization, the expectation
17 is that the officers would implement the changes with those they supervised. He also started periodic
18 "Safety Committee Meetings." The purpose of this was to allow input on safety issues that may be
19 of concern with the firefighters.

20 Chief Bathke thought it was important that he provide support to the City Council and
21 members of the public. He attended virtually all of the City Council's meetings. He prepared and
22 presented department budget/status reports to the City Council and residents of Ocean Shores.

23 **No Complaints Filed Regarding Chief Bathke**

24 While Chief Bathke was the fire chief, not one complaint was filed by any employee
25 (firefighter or otherwise) against him, even though the City and the fire department have a strict
26 policy of both allowing the filing of complaints and also of prohibiting retaliation for the filing of
27 any complaint (Ex.174). The fact that no complaints were ever filed against him is noteworthy
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1 because the firefighters had a reputation of filing a complaint for even the smallest perceived
2 transgression. For instance, one firefighter complained that there needed to be an additional
3 microwave in the kitchen as he did not like to wait when someone else was warming their meal.

4 Also, during Chief Bathke's tenure, not one Grievance was filed with the Union regarding
5 any of the issues used by the Mayor to justify terminating Chief Bathke. This is also of interest
6 because the City's firefighters had no hesitation for filing a Union Grievance even if they felt they
7 had been shorted by two dollars in their paycheck.

8 The City's policy as expressed in its Personnel Manual, states, "*Employees are to be*
9 *evaluated by their Department Heads or supervisors prior to completion of their probationary period*
10 *and at least once every 12 months thereafter. The evaluation is part of an employee's personnel*
11 *record and may be a factor in determining the employee's conversion to regular status, whether the*
12 *employee receives a wage increase, or is to be promoted, transferred, demoted, laid off, or*
13 *terminated*". (Ex.108). The Mayor never brought to Chief Bathke's attention any concerns or any
14 complaints being expressed by the unionized firefighters and did not give Chief Bathke an annual
15 performance evaluation. The only indication he had about his job performance were positive
16 compliments from the Mayor to him until after the Union vote of no confidence was taken.

17 **The No Confidence Vote**

18 On December 10, 2018, the firefighter's union took their vote of no confidence. It was not
19 part of their meeting agenda. It was brought up at the end of the meeting under the generalized
20 category entitled the "Good of the Order" which is a time for general comments to be made.
21 (Ex.111). By this time, several of the firefighters had left the meeting and did not take part in the
22 vote. The motion was presented by the Union president, Corey Kuhl, who projected on the wall the
23 disparaging Maple Valley Union letter from 2016 that he had kept secretly hidden for eighteen
24 months, and he used this to convince the other members to vote for the no confidence. It is unclear
25 whether the vote was an open, verbal vote, a hand vote or was by secret ballot. Neither the Union nor
26 the City have ever produced any written ballots.

1 On December 13, 2018, the proponents of the no confidence vote, Corey Kuhl, Union local
2 president and Matt Krick, a captain of the City's fire department, presented to the Mayor that a
3 unanimous no confidence vote had passed and demanded that if she did not take action against Chief
4 Bathke they would take it to the "press and news if necessary." (Ex.114). This was important to the
5 Mayor because she was involved in a hotly contested Mayor race which she ultimately won by a
6 mere three votes after receiving the firefighters Union's endorsement. The Minutes from the Union
7 meeting clearly shows that the no confidence vote was not unanimous as reported to the Mayor and
8 eventually to the media. (Ex. 111).

9 On December 14, 2018, the day after the Union leaders made its demand, Mayor Dingler
10 entered into Chief Bathke's office, handed him a letter informing him that she was putting him on
11 administrative leave in light of the fact that the union had issued a vote of no confidence regarding
12 his leadership of the department. He was immediately required to turn over his work phone, his work
13 vehicle, work computer, city credit card, and all fire department keys, and was escorted out of the
14 building by a police officer in full view of the public, firefighters, and other office workers at the
15 direction the Mayor. This came as a complete shock to Chief Bathke. He had no knowledge that there
16 were major issues between him and the Union or that a no confidence vote would be taken. Needless
17 to say, Chief Bathke was devastated.

18 The Mayor never counseled Chief Bathke on any problems, nor arranged a meeting between
19 the Chief and the Union leaders to try and resolve any issues. This is a violation of the City's
20 progressive and corrective policy which is found not only in the fire department's general orders, but
21 also in the City's contract for the City's union members.

22 After speaking to some, but not all, of the firefighters, the Mayor engaged the services of
23 Robin Nielsen, an outside investigator to conduct an independent investigation. However, Mayor
24 Dingler arranged for Ms. Nielsen to speak to only six of the firefighters who were described as the
25 "moving force" behind the vote. (Ex.113). Indeed, these six firefighters whom the Mayor chose for
26 Ms. Nielsen to interview were the six that had experienced the largest decline in their overtime
27 compensation as a result of the changes Chief Bathke had implemented. (Ex.138).

The Independent Investigator Hired by the City Concludes there was No Cause for Termination

On January 9, 2019, Ms. Nielsen came to the City to interview the firefighters that were the moving force behind the no confidence vote. The investigator never spoke to Chief Bathke, never spoke to any of the other 13 full time fire fighters, never spoke to any of the volunteer fire fighters, never spoke to any witnesses that may have supported the chief, and never spoke to any of the fire chiefs in the area that were impressed and complimentary to Chief Bathke. (Ex.170).

After her limited interview of the “moving force” firefighters, on January 11, 2019, Investigator Nielsen informed the City of her conclusion that there was no case for harassment or discrimination. She went on to say that there may be performance issues and asked if the City wanted her to investigate these issues which would require that the City provide her with a job performance standard for the fire chief and would include interviewing Chief Bathke. The City responded a few days later on January 15, 2019, by instructing Ms. Nielsen to suspend her investigation. The very next day, January 16, 2019, Mayor Dingler informed Chief Bathke that she “did not see a way forward for him”. The Mayor states in her letter, “If you do not wish to accept a separation agreement, then you will be placed on *unpaid* leave after February 8 and I will begin the *disciplinary process* which will include providing you with appropriate notice and an opportunity to be heard as to the basis for moving forward with *separation*” (*emphasis added*). (Ex.116). The Mayor made no offer to discuss corrective action and made no offer to negotiate the terms of the settlement. It is clear that the Mayor had already made up her mind to terminate Chief Bathke.

In response, Chief Bathke hired legal counsel, who responded with a letter reminding the Mayor that she could not terminate the Chief without a proper, unbiased pre-termination hearing. Chief Bathke could not accept the resignation; as to his knowledge, there was no basis for his discipline since he performed his job as directed by the Mayor. The letter also suggested that the parties attempt to mediate the situation which could be a “win, win” for each. (Ex.117). This was particularly true since Chief Bathke was 57 years old at the time and his prospects of obtaining other employment was small. The City failed to respond to this offer.

The After-the-Fact Allegations Made Against the Chief

Because Chief Bathke's attorney demanded to know on what basis the City was terminating the Chief, on February 13, 2019, the City provided Chief Bathke with a pre-termination list of charges against him. Chief Bathke was blindsided when he received this list of charges because this was the first time he had heard that any of these were issues of concern. Chief Bathke therefore set out to gather evidence to see if there was any truth to the allegations made against him. What he found out is that most, if not all, of the allegations had no truth whatsoever or were de minimus and had apparently been manufactured after the Union no confidence vote as a pretext to justify his termination. A summary of most of the charges and the evidence relating to them follows:

1. The Mayor alleged that Chief Bathke acquired poor fitting, and poor-quality bunker gear. The evidence was that the bunker gear was acquired from Viking Life Saving Equipment USA ("Viking"), a world leader in the manufacture of bunker gear. Chief Bathke required Viking to come to Ocean Shores to have each firefighter personally measured and fitted. When the gear arrived, each firefighter tried it on and all, but a few, felt the fit was perfect. For those few that had issues, Viking remanufactured new gear for them. Chief Bathke does not recall any other complaints about the gear. The gear met all NFPA guidelines and certifications for safety and Chief Bathke's experience with this same type of gear with other fire departments was positive. The gear was also warranted for ten years, so if there were any problems with it, Viking would have gladly honored its warranty. The gear was a second set of gear, as the City had never provided a second set of gear to the firefighters. Chief Bathke felt it was important that the fire gear be kept clean at all times. His experience was that a second, alternative set should be maintained, so that when the normal gear is dirty it could be cleaned and a second, back-up gear would be available. A copy of a letter from Viking describing the gear and the warranty was presented to the City by Chief Bathke during the hearing on March 12, 2019. (Ex.135).
2. The Mayor alleged that Bathke used poor judgment by purchasing a replacement generator from Honda that was mounted on one of the engines that did not have a remote start. She also

1 alleged that he failed to take input from the firefighters regarding the generator. The evidence
2 is that Chief Bathke authorized the acquisition of a new generator because of input from the
3 firefighters that the old Honda model was failing. He communicated with the firefighter who
4 was responsible for acquiring the equipment, Jeremy Towery. In an email, firefighter Towery
5 informed the Chief of the maximum dimensions for a replacement generator. The same
6 Honda generator in an updated version was larger and would not fit into the dimensions
7 provided by firefighter Towery. Chief Bathke therefore had no choice but to purchase a
8 generator that would fit within the encasement dimensions. This was discussed with
9 firefighter Towery who agreed that the Generac model that was purchased was a great
10 comparable. After the Generac was installed, it was discovered that the remote control was
11 not compatible with the electric start generator. When Chief Bathke heard about this problem,
12 he tasked firefighter Towery with resolving this issue. After this, there were no complaints
13 reported to Chief Bathke about the new generator until he received the Summary of Charges
14 on February 13, 2019. Attached is a copy of the email exchanged between the Chief and
15 firefighter Towery where the Chief is informed of the maximum dimensions for a new
16 replacement model. (Ex.147).

- 17 3. The Mayor alleged that he used poor judgment by purchasing “Paladin portable generators
18 from a company that was going out of business.” The evidence is that Paladin did not go out
19 of business but rather was acquired by Honeywell. These were small, handheld, portable
20 generators that cost about \$250 each. At his deposition, firefighter Curt Begley admitted that
21 the Paladin generator issued to him works and made his job safer. (Ex.152).
- 22 4. The Mayor alleged that Chief Bathke “forced” upon the firefighters a new digital calendaring
23 software called Aladtec. Chief Bathke was tasked by the Mayor to convert the department
24 from an antiquated, paper record keeping system, to an electronic reporting system. This was
25 discussed at length with the Mayor and was determined to be a necessary change for the
26 department. Both electronic systems, Aladtec and Image Trend, are currently used by the fire
27 department and provides multi-purpose functions as well as reporting compliance.

- 1 5. The Mayor alleged that Chief Bathke failed to follow protocol and provide certain rights to
2 firefighter Schmitz who was the subject of disciplinary process in July and August of 2018.
3 The evidence is that Chief Bathke followed closely the directions of not only HR Specialist
4 Dani Smith, but also the City's labor attorney Beth McIntyre during these proceedings.
5 Indeed, at the initial interview he insisted that HR Specialist Smith be present as well as
6 having captain Mike Thuirer and firefighter Schmitz' union representative present. The next
7 day he sought and received emails from attorney McIntyre outlining the process and protocol
8 to be followed. He at all times followed the directions from the Mayor, Dani Smith, and
9 attorney McIntyre. Although the Mayor claims that this incident resulted in a grievance being
10 filed, the evidence is that no grievance was filed.
- 11 6. The Mayor alleged that he "endangered the lives of our citizens by permitting a retired fire
12 chief friend of yours to be in charge of the station for the department over the fourth of July
13 holiday." The evidence is that given the demands on the department during the fourth of July
14 holiday, the department would seek out and hire multiple volunteers. One of the volunteers
15 hired was a firefighter named Brian Petersen who had over 30 years' experience and had
16 previously worked as a chief. (Ex.149). Chief Bathke's belief was that it was better to use
17 someone with command experience rather than someone with no experience.
- 18 7. The Mayor alleged that "fire stations are uniformed quasi-military run organizations" and
19 that Chief Bathke would break the chain of command by speaking directly with lower ranking
20 firefighters. The evidence is that the chief would hold officers' meetings where only the
21 officers were present, and issues would be discussed so the officers could implement them
22 with their subordinates. Given that Ocean Shores is a small fire department, the Chief
23 believed it would have been wrong for the Chief to ignore communications from any fire
24 department personnel.
- 25 8. The Mayor alleged that the chief was "not present" at a fatality fire "until after the scene had
26 cleared" and that he never "followed up with staff at all to inquire as to their wellbeing." The
27 evidence is that the chief was at the fatality fire and he produced photos that he took on his
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1 cell phone confirming this. A copy of these pictures was presented to the Mayor at the March
2 12 hearing. After the fatality fire, the Chief did in fact communicate with captain Matt Krick,
3 the officer in charge, and stated to Captain Krick if he or the crew needed anything to let the
4 Chief know.

5 9. The Mayor alleged that the “staff had difficulty reaching [the chief] during a tsunami alarm”.
6 The evidence is that Chief Bathke was the incident commander during the tsunami alarm and
7 was present and aware of all aspects of it. After this tsunami alarm, Captain Mike Thuirer
8 sent Chief Bathke an email to thank him for taking charge. (Ex. 150)

9 10. The Mayor alleged that the chief had a reputation of “my way or the highway attitude.” The
10 evidence is that he worked closely with the Mayor on all decisions and actions taken. The
11 Mayor hired Chief Bathke, rather than promoting Captain Brian Ritter, who was the acting
12 chief and had been with the department for 15 years, as the department was fraught with
13 problems that needed to be fixed, and she needed a strong leader. (Ex.172).

14 11. The Mayor alleged that on one occasion, Chief Bathke slapped the table and pointed his finger
15 at someone who disagreed with him. Chief Bathke has no recollection of ever pointing his
16 finger at anyone. However, if a subordinate is refusing to take direction, then the Chief, who
17 was making drastic changes, would have no choice but to be firm and direct. The Chief does
18 not use nor tolerate profanity.

19 12. The Mayor alleged that Chief Bathke had lost the trust and respect of his firefighters. When
20 the Mayor did her investigation, she did not seek opportunities for more evidence, and did
21 not interview other potential witnesses, which should be a consideration as well. Moreover,
22 the Mayor ignored other evidence such as a personal letter written by a firefighter to Chief
23 Bathke stating the following:

24
25 “CHIEF BATHKE, I SIT HERE TRYING TO THINK OF THE WORDS TO THANK
26 SOMEONE LIKE YOURSELF WHEN THANK YOU IS JUST NOT ENOUGH...IT
27 NEVER CEASES TO AMAZE ME THE SELFLESSNESS THAT PEOPLE SHOW
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1 TOWARDS EACH OTHER IN THE FIRE SERVICE...I DO UNDERSTAND IT TAKES
2 BABY STEPS JUST AS IT WILL TO MAKE CHANGES IN THE DEPARTMENT. IN
3 TIME THE CHANGES WILL BE SO GREAT IT WILL BE WORTH THE WAIT. THE
4 CHANGES YOU ARE ALREADY MAKING HAVE DEFINITELY BEEN NOTICED. I
5 HOPE TO CONTRIBUTE TO THOSE CHANGE ANYWAY I CAN. THANK YOU SO
6 MUCH FOR THIS OPPORTUNITY....” (Ex. 125)

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8 On March 12, 2019, the mayor held an informal hearing in her private office regarding the
9 charges. During the hearing Chief Bathke methodically presented the evidence refuting each and
10 every charge made by the City.

11 At the hearing, Chief Bathke’s counsel again brought up the fact that the City’s own rules
12 and regulation mandate a progressive, corrective handling of disciplinary matters and that
13 termination was only a last resort after the other efforts had failed. He suggested that the City
14 facilitate a meeting with the Union, the Chief, the Mayor and perhaps a corporate counselor to address
15 any problems and work out a resolution. The City refused. Instead, ten days later, the Mayor sent a
16 letter to Chief Bathke confirming his termination.

17 After he was terminated, Chief Bathke began searching for another job in the
18 firefighting/EMS industry. He has placed more than 250 applications throughout the country and has
19 been turned down on everyone, even with his many accomplishments, and past stellar performance
20 reviews. (Ex. 127). This includes lowest level jobs in the industry. According to a fire industry
21 expert, Jeff Heaton, the firefighting industry is somewhat unique in that the actions such as those that
22 occurred with Chief Bathke are “detailed in national and worldwide distributed fire service media
23 outlets, internet blogs, and magazines.” This is exactly the case with Chief Bathke, and it has become
24 impossible for him to find work in his profession of over 40 years.

25 DISCUSSION

26 As discussed above, Chief Bathke is provided the same standards applicable to the “City’s
27 union-represented employees” when determining whether proper cause existed to terminate him.

1 This provided Chief Bathke several important protections none of which were followed by the City
2 in this case:

3 **A. The City Failed to Follow a Progressive, Corrective Procedure Prior to Termination.**

4 In Ocean Shores, a Union worker is entitled to a multitude of procedural rights and processes
5 before he or she can be fired. This process, according to the City's own published Orders, Standard
6 Operating Guideline 2000.00 entitled "Managing the Discipline Process," requires that the employee
7 be disciplined in a corrective, progressive manner with proper counseling and a Personal
8 Improvement Plan that attempts to correct the deficiencies. Only if the deficiencies are not corrected
9 after three (3) attempts can the employee be terminated. (Ex.121). In addition, the Memorandum of
10 Understanding dated November 30, 2018 (Ex.122) between the City and the firefighters Union,
11 requires the City, prior to imposing any discipline, to sit down with an employee facing discipline
12 and create a written Personal Improvement Plan (PIP) to address the disciplinary issues. The
13 employee is then to be monitored and evaluated given the dictates of the PIP for a 12-month period.

14 No progressive, corrective process was afforded to Chief Bathke. No one sat down with him
15 to create a PIP or to address the perceived issues. Indeed, Chief Bathke was never given the
16 opportunity to correct any perceived deficiencies. This is despite the fact that once the no confidence
17 vote was brought to Chief Bathke's attention he offered, on at least two occasions, to meet with the
18 Union officers and the City in an effort to address and correct the perceived issues.

19 In fact, Chief Bathke was given no notice whatsoever of any problems with his management
20 style, or on any issues with the Union. Not one complaint was filed against him by the Union or any
21 firefighter, and not one grievance was filed that dealt with his management style or the changes he
22 was implementing. This is telling given that the Union's firefighters have no problem with filing a
23 grievance if they felt they were shorted even \$2 in a paycheck or filing a complaint for such minor
24 things such as having to stay in line to warm their food because the department had only one
25 microwave. This is also telling because the City has a strict no-retaliation policy. (Ex.131). And
26 the Chief conducted monthly Officers' Meetings where an open forum was held in which anyone
27 could raise any issue whatsoever. Not one complaint or criticism of Chief Bathke was ever made in
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any of these meetings (Ex.173). Surely, if a firefighter had a true complaint or issue, he would have brought them up in one or more of these meetings.

Moreover, absent from Chief Bathke's personnel file is any notice whatsoever that there were problems with his performance or the manner in which he was managing the department. His personnel file was an example of a stellar employee. Finally, the City's policy required the Mayor to provide to the Chief a formal work performance evaluation, each year, on the anniversary date of his employment. She failed to do this with Chief Bathke.

In short, given the absence of any complaints, grievances, or evaluations there is no way the Chief could have any notice that there were issues regarding his management style. This is even more true since he would confer with the Mayor on almost a daily basis (his office shared a common door with hers) and she never notified him of any issues whatsoever.²

Because the City did not follow its own "for cause" procedures before terminating Chief Bathke, the City breached the agreement.

B. The City Failed to Follow the Seven Daugherty Factors that Must be Applied to a Union Worker Prior to Termination.

Unlike non-union workers, a union worker is protected by a collective bargaining agreement. Before a union employee can be terminated, the City must employ what is commonly known as the seven Daugherty factors:

...the collective bargaining agreement ensures that no officer will be discipline except for "just cause." "Just cause" is a term of art in labor law, and its precise meaning has been established over 30 years of case law. Whether there is just cause for discipline entails much more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances and the appropriateness of the penalty... Seven factors are considered in determining whether there was just cause

² The City asserts that on Nov. 14, 2018, the Mayor had an informal meeting with the Chief where she expressed concern over his management style. Chief Bathke denies that any meeting took place and will have irrefutable proof that no such meeting occurred.

for discipline, including whether the employer applied its rules even-handedly, and whether the degree of discipline was reasonably related to the seriousness of the infraction given the employee's record of service. *Civil Service Com'n of City of Kelso v. City of Kelso*, 137 Wash.2d 166,173 (1999).

The seven Daugherty factors were developed in 1964 by the famous arbitrator Carroll Daugherty to establish a single standard to determine if the discipline or discharge of an employee can be upheld under a for cause standard. These factors are used in many jurisdictions when determining whether discipline should be imposed against a union worker, including Washington. *Civil Service Com'n of City of Kelso v. City of Kelso*, 137 Wash.2d 166,173 (1999). *Logan v. Pierce Cty. Fire Prot. Dist. No. 2*, 126 Wash.App. 1051, F.N. 7 (unpublished); *City of Seattle v. City of Seattle* 230 P.3d 640 (2010); *City of Seattle Police Dept. v. Werner* 261 P. 3d 218 (2011).

The seven Daugherty factors are:

1. Was the worker given advance warning of the probable consequences of his conduct?
2. Was the controlling rule, order or standard allegedly violated reasonably related to efficient and safe operations?
3. Did the employer fully investigate to determine that the employee actually violated the rule?
4. Was the investigation fair and objective?
5. Did the investigation uncover substantial proof of guilt?
6. Was the employer's treatment even-handed and non-discriminatory?
7. Was the discipline decided fair and reasonable given the gravity of the offense?

Regarding factors 6 and 7 the factors to be considered are:

- a. Seriousness of the infraction
- b. Employee's past coaching, discipline
- c. Employee's length of service
- d. Employee's total performance record
- e. Unusual mitigating circumstances

1 f. How does it compare with what has been done in other similar circumstances; will
2 this employee be receiving the same discipline as others who violated this rule or
3 standard?

4 g. Does this employee have the worst record of all employees on violation of this
5 rule?

6 Here, the City's decision to terminate Chief Bathke does not pass muster with any of these
7 factors needed to show that proper cause existed. Chief Bathke was not provided any advance
8 warning of the probable consequences of his conduct. In fact, he had no notice whatsoever.

9 The City has not identified any rule, order or standard that Chief Bathke has violated. Indeed, the
10 independent investigator, Robin Nielsen, concluded that there she could find no violation of
11 harassment or discrimination standards, and when she asked to look into possible work performance
12 issues, she was instructed to stop her investigation.

13 A full investigation was never completed. For instance, Chief Bathke was never interviewed
14 nor were any witnesses who supported him. The only witnesses interviewed were those who were
15 labeled as the "moving force" behind the no confidence vote. Even after they were interviewed the
16 investigator found no malfeasance on the part of Chief Bathke. The investigation was not fair and
17 objective as it only looked at one side. Indeed, neither the City nor the investigator ever spoke with
18 Chief Bathke or anyone on his behalf. A one-sided investigation, by definition, cannot be fair and
19 objective. The investigation produced no proof of guilt. In fact, Ms. Nielsen found the opposite, that
20 there was no evidence of harassment or discrimination.

21 Finally, the discipline decided was not reasonable given the gravity of the alleged offense. If
22 there were issues between the rank and file union workers and the Chief, then an effort should have
23 been made to sit down and mediate the issues. This is especially true in this case since the Mayor
24 knew that Chief Bathke had a no nonsense, tough personality and was brought in to make significant
25 changes to the fire department. The Mayor knew that making these changes would cause friction,
26 and told Chief Bathke that she would support him, nevertheless. After he did her bidding, she turned
27 her back on him and summarily sentences him to the guillotine.

1 Given the facts of this case, the City did not have the proper cause to terminate Chief Bathke.

2 **C. The City Uses the Wrong Standard to Determine Whether There was Cause.**

3 The Exempt Employee Agreement between the City and Chief Bathke states that his
4 “employment shall not be terminated by the City except for “*cause*”, *with the grounds therefor to be*
5 *the same as those applicable to the City’s union-represented employees.*” (“*emphasis added*”). The
6 City acknowledges this language but simply says its “intent” was “to confirm that the exempt
7 employees were not terminable “at will.” (City brief at 15/22-23). The City then applies the definition
8 of “just cause” established by *Baldwin v. Sisters of Providence in Washington*, 65 Wash.App.93
9 (1992). This is a fundamental error in the City’s analysis.

10 *Baldwin* did not involve union workers. Non-union workers are not provided the same level
11 of protections and rights relating to discipline. This is because union workers are covered by a
12 collective bargaining agreement which provides these enhanced and significantly greater rights. (See
13 *Civil Service Com’n of City of Kelso v. City of Kelso*, 137 Wash.2d 166,173 (1999) [Collective
14 bargaining agreement requires “much more” than a valid reason to impose discipline]. As discussed
15 above, the “cause” required to discipline a union worker (which Chief Bathke is entitled to) involves
16 an analysis of the seven Daugherty factors as well as affording him the progressive, corrective
17 process. None of these factors applies to the non-union workers that were present in *Baldwin*. As
18 such, the *Baldwin* standard does not apply here.

19 **DAMAGES**

20 Chief Bathke is now 59 years old. His prospects for employment are dim. This is
21 compounded by the fact that the City (apparently through Cory Kuhl) leaked to the news media the
22 disparaging Maple Valley Union Letter. The disparaging statements made were picked up not only
23 by the local media but by the national and international firefighter journals and magazines. The result
24 is that the Chief has been unable to find any work despite applying to more than 250 jobs. (Ex.143)
25 At this point, it must be concluded that he will be unable to find work in the firefighting industry for
26 the remainder of his work career.

27 This is devastating to Chief Bathke for several reasons. First, he had planned to work with the
28

City for at least 10 years (Ex.144). If he had been able to work for only another three years, then he would have qualified for pension benefits. The City took this away, so that the Chief now has minimum retirement income. He has been made financially destitute.

A forensic CPA expert was retained to calculate Chief Bathke's damages. This was presented in a detailed report, a summary of which is provided below. The conclusion of the expert is that Chief Bathke's economic damages are \$1,461,514.

David W. Bathke		Schedule 1
v.		
City of Ocean Shores, et al.		
Summary of Damages		
Past Lost Salary from Termination Date Through December 31, 2019	Schedule 3	\$90,880
Future Lost Salary from January 1, 2020 Through Expected Retirement (discounted to present value)	Schedule 4	\$812,162
Lost Pension Benefits (discounted to present value)	Schedule 5	\$498,486
Past Lost Dental Insurance Benefits from Termination Through December 31, 2019	Schedule 9	\$1,080
Past Lost Life Insurance Benefits from Termination Through December 31, 2019	Schedule 9	\$333
Lost Dental Insurance Benefits (discounted to present value)	Schedule 10	\$9,113
Lost Life Insurance Benefits (discounted to present value)	Schedule 10	\$2,785
Forgiveness of Loan (discounted to present value)	Schedule 11	\$66,149
Total Damages		<u>\$1,480,988</u>
Total Unemployment Benefits Received by Mr. Bathke		<u>\$19,474</u>
Net After Unemployment Benefits		<u>\$1,461,514</u>

1 Respectfully Submitted:

3 DATED: November 12, 2020

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11 DATED: November 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, under the laws of the United States of America that on this date, I caused to be electronically filed the foregoing document, and this Certificate of ECF Filing & Service, with the Clerk of the Court using the CM/ECF system, who will send notification of such filing to the following party:

Attorney for Defendants

Elizabeth A. McIntyre, emcintyre@lldkb.com
Brent Dille, brent@dillelaw.com

DATED this 12th day of November, 2020, at Laguna Hills, California.

/s/ Kelsey Krueger
Paralegal